SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1970

No. [redacted] 70

LYNN PORTER, Petitioner,

versus

JOHN P. ASHMORE, JR., Greenville County Supervisor, A. C. THOMPSON, Greenville County Auditor, WILLIAM D. LEEKE, Director of the Department of Corrections, and the STATE OF SOUTH CAROLINA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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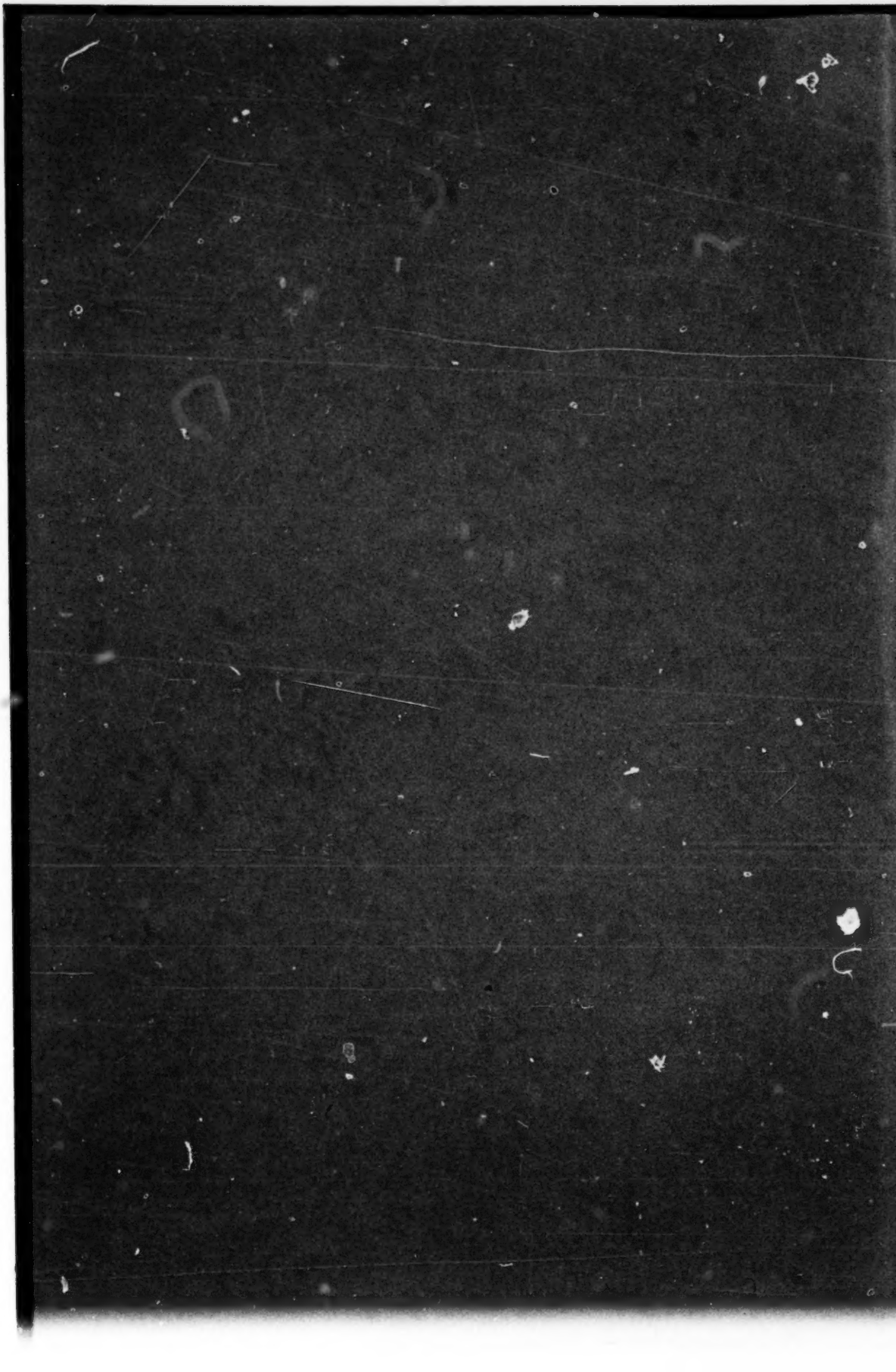

INDEX

PAGE

Jurisdiction 2

Questions Presented 2

Statement of Case 2

Reasons for Granting the Writ:

I. The petitioner was denied due process of law, guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States, by the receipt as evidence of various alleged gambling paraphernalia, seized from the petitioner's residence by police officers without his consent or permission and without the existence of possession of a search warrant 4

II. The search and seizure of the alleged gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should not be sustained because the petitioner did not knowingly and intelligently consent to such search and seizure 8

Summary 16

Conclusion 17

Appendix 19

AUTHORITIES CITED

Cases: PAGE

Channel v. United States, 285 F. (2d) 217 10

Chimel v. California, 395 U. S. ..... (1969) 6, 7

Harris v. U. S., 331 U. S. 145 8

Higgins v. U. S., 209 F. (2d) 819 .....13, 15

Johnson v. U. S., 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436 .....11, 13

Judd v. U. S., 89 U. S. App. D. C. 64, 190 F. (2d) 649 11, 12, 16

Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. (2d) 694 11

U. S. v. Lewis, 274 F. Supp. 184 11

U. S. v. McCurn, D. C. D. N. Y. 1930, 40 F. (2d) 295 .. 12

U. S. v. Novero, D. C. 58 Supp. 275 12

U. S. v. Page, 302 F. (2d) 81 .....13, 14

U. S. v. Rabinowitz, 339 U. S. 56 8

U. S. v. Vickers, 387 F. (2d) 703 (4th Cir. 1967) 10, 15, 16

Von Cleef v. New Jersey, 89 Sup. Ct. 205 (1969) 6, 7

Statutes, Etc.:

Title 28, U. S. Code, Section 1254 (1) 2

Supreme Court of the United States

No. ————

LYNN PORTER, PETITIONER,

versus

JOHN P. ASHMORE, JR., GREENVILLE COUNTY SUPERVISOR, A. C. THOMPSON, GREENVILLE COUNTY JAILOR, WILLIAM D. LEEKE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND THE STATE OF SOUTH CAROLINA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Lynn Porter, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case of February 10, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for Fourth Circuit, # 13,597 was decided February 10, 1970 and is reported at page 32.

JURISDICTION

The judgment of the United States District Court for the District of South Carolina was reversed by the United States Court of Appeals for the Fourth Circuit on February 10, 1970, and this Judgment is a final Judgment in this matter.

The jurisdiction of the Court is invoked pursuant to Title 28 United States Code, Section 1254 (1), petitioner having asserted below and is asserting here, deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED

Question One

Was the evidence introduced in the trial of the petitioner, the fruits of an unlawful search and seizure, or was the search and seizure without a search warrant, lawful as having been properly made incidental to and contemporaneously with a lawful arrest?

Question Two

Should the search and seizure of the alleged gambling paraphernalia by law enforcement officers of the home of the petitioner, without a search warrant, be sustained, because the petitioner knowingly and intelligently consented to such search and seizure?

STATEMENT OF CASE

This action originated in Greenville County, South Carolina. The petitioner, his wife and several children resided in a private dwelling just outside the City of Greenville. On December 31, 1965, the petitioner was in his residence with his wife and children when officers of the State Law Enforcement Division and officers of the Greenville County Sheriff's Department, knocked at the door of the

residence. The petitioner answered the door and was told that the police wanted in. He asked the officers if they had a Search Warrant and was told that they had none. The officers then informed him that they had an Arrest Warrant and that he was under arrest. They entered the residence and, according to the officers, asked permission to search. Whether permission was verbally given or not, the officers did search the entire premises and also the personal effects of the petitioner's wife. The house, including the basement, was then immediately searched for gambling paraphernalia In one of the basement rooms, described as a den or playroom, there was located a telephone with four or five incoming lines operated by pushbuttons. In addition, there was found in the basement rooms, basketball, baseball and football parlay cards, dice, playing cards, and books showing figures and scores on basketball and football games. The foregoing items were taken by the officers and later introduced in evidence at the trial, over the petitioner's objection. They seized a large quantity of alleged evidence and took money from the pocketbook of the petitioner's wife, who was never arrested. Both the seized physical evidence and the money, taken from petitioner's wife, were later introduced into evidence against the petitioner, over petitioner's objection. It was admitted by the police officers that there was no Search Warrant; that they did not advise the petitioner of his right to remain silent; that they questioned him without his attorneys being present; and did not advise him of his right to have an attorney present.

Upon the trial of the matter and at the completion of the State's case, all appropriate Motions were made and refused by the Court. The petitioner offered no testimony or evidence in his own behalf. He was found guilty. Appropriate Motions for a new trial and for a setting aside of the verdict were made and refused. An Appeal was taken to the South Carolina Supreme Court on the questions pre-

sented herein and other questions of law. The conviction was affirmed and Rehearing was denied. Petition for Writ of Certiorari to the United States Supreme Court was denied. On April 14, 1969, however, the United States District Court for the District of South Carolina, Columbia Division, following a hearing upon a Writ of *Habeas Corpus,* declared the search for and the seizure of gambling paraphernalia by law enforcement officers from the petitioner's home unlawful. As a consequence, Porter's conviction was set aside by the District Court on a hearing upon a Writ of *Habeas Corpus.* The State of South Carolina thereafter appealed.

The United States Court of Appeals for the Fourth Circuit, reversed the United States District Court. Thus, the matter is before this Court.

REASONS FOR GRANTING THE WRIT

The Petitioner was denied due process of law, guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States, by the receipt as evidence of various alleged gambling paraphernalia, seized from the petitioner's residence by police officers without his consent or permission and without the existence or possession of a search warrant.

The really basic issue in this matter is whether or not there was a lawful search and seizure of physical evidence. All other points turn solely upon this. It should be remembered that the petitioner lived in a private residence with his wife and several children. The premises were solely those of a private residence. The authorities had been building a case against the petitioner for a matter of several weeks and had concluded the investigative portion of the matter prior to December 29, 1965. On the 31st of December, 1965, a local magistrate issued an arrest warrant based upon the affidavit of the Investigating Officer Owens. Armed

with the warrant, the several State and County Officers, without a Search Warrant, arrested the petitioner at his residence and conducted what the petitioner insists, was an unlawful search of his residence; the person of his wife; and seizure of the disputed evidence. The issue can best be described by the testimony of the lieutenant of the county police, who was present at the time of the search. The pertinent testimony of Lt. Coleman is found at Appendix 30 and 31 and is, as follows:

> Q. Officer Coleman, when Mr. Owens gave you this arrest warrant you knew at that time that you were going to Lynn Porter's house, did you not?
>
> A. Yes, sir.
>
> Q. You knew exactly what you were looking for, did you not?
>
> A. Yes, sir.
>
> Q. Did you make the statement—did I understand you correctly to say you went out to Mr. Porter's house to serve a warrant and quote 'see what evidence we could pick up at the house'?
>
> A. Yes, sir.
>
> Q. You are an experienced officer?
>
> A. Well, I've been on the force about ten and a half years.
>
> Q. You've had occasion to make many arrests, have you not?
>
> A. Yes, sir.
>
> Q. You knew exactly what you were going up there to pick up?
>
> A. I knew we were hunting gambling paraphernalia.
>
> Q. At no time did you have a search warrant, did you?
>
> A. No, sir."

It is the position of the State that the failure of the State of South Carolina to provide for the issuance of a search warrant in matters of this type would excuse and justify the necessity for a search warrant. The State of

South Carolina has provided for the issuance of search warrants in specific instances, but until after this case, had not seen fit to provide for a search warrant of the residence of a person to justify the search and seizure of gambling paraphernalia. Since this case was decided, the State has enacted such a statute. The fact remains, however, that none of the statutes of this State, prior to the trial of this matter, empowered officers to legally search a residence for gambling paraphernalia. It must therefore be assumed that the State intended that such a search and seizure should not be made. To excuse the failure of the State to have a search warrant, the State must then rely upon a search and seizure incidental to a lawful arrest. The State contends that this search and seizure was not lawful, incidental to the arrest and violation of the basic constitutional rights of the petitioner under the Fourth and Fourteenth Amendments to the United States Constitution.

The petitioner argues the matter in light of the recent decisions of the United States Supreme Court in *Chimel v. California*, 395 U. S. —— (1969). In addition to *Chimel*, the most pertinent decision is that of *Von Cleef v. New Jersey*, 89 Supreme Court 205 (1969). In *Von Cleef*, the issues were almost identical. Without hesitation, the Court decided that the action of police in completely combing a three story house and carting away numerous papers and publications cannot, under any view of the Fourth Amendment be justified as being "incidental to arrest." Bear in mind, that Porter was arrested in his home and the entire premises were searched after his arrested and a large volume of papers and paraphernalia were seized and carted away. These are the identical papers introduced upon the trial of the case and to which introduction petitioner constantly objected. In light of *Von Cleef* and the *Chimel* case, the action of the authorities was in absolute violation of the rights of Porter. The search extended much further

afield than the area considered to be in the possession or under the control of the person arrested. In *Chimel,* the Court, after reviewing the historical application of all of the law prior to 1969 held:

> "A similar analysis underlies the 'search incident to arrest' principle, and marks its proper extent. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The adherence to judicial processes' mandated by the Fourth Amendment requires no less."

The Court, in *Von Cleef* held, without equivocation, that this point is not valid. They found that it need not be decided whether Chimel should be applied retroactively, for even under the constitutional standards prevailing before

Chimel (*U. S. v. Rabinowitz*, 339 U. S. 56; *Harris v. U. S.*, 331 U. S. 145) if the search and seizure were constitutionally invalid, the point is moot. The mere fact that the search and seizure was illegal, unlawful and in violation of constitutional rights prevented the introduction of the seized evidence and the Court would look no further.

The search and seizure of the alleged gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should not be sustained because the petitioner did not knowingly and intelligently consent to such search and seizure.

The petitioner first came to the door of his residence, answered a knock upon the door and when he opened the door, was informed by the officers that he was under arrest. It is not denied that the following conversation took place:

> "Q. When he came to the door, what, if anything did you or Lieutenant Coleman, or Mr. Morris say to him?
>
> A. Mr. Porter asked Lieutenant Coleman if he had a search warrant, and Lieutenant Coleman said he had an arrest warrant.
>
> Q. And is State's Exhibit No. 1 the arrest warrant which he had with him at that time?
>
> A. Yes, sir.
>
> Q. Was it served upon the defendant at that time, read to him?
>
> A. Lieutenant Coleman—Mr. Porter unlocked the door and we stepped inside and Lieutenant Coleman read it to him.
>
> Q. Were you present at all times when this was done?
>
> A. Yes, sir.
>
> Q. Where is Lieutenant Coleman today?
>
> A. Lieutenant Coleman's wife is sick and he carried her to Georgia.
>
> Q. Upon stepping inside and the warrant being read, sir, upon the defendant, what, if anything, did

you or Mr. Morris, or Lieutenant Coleman—just tell us what happened?

A. Well, Mr. Porter, I believe, had on a white tee shirt and a pair of pants, and bedroom slippers as well as I remember, and Lieutenant Coleman read him the warrant. And after he read it he told him he wanted to look around.

Q. Who said 'I want to look around'?

A. Lieutenant Coleman.

Q. Lieutenant Coleman told the defendant he wanted to look around. What, if anything, did the defendant said?

A. He said, 'Go ahead', or 'Help yourself'."

It was at this point that Porter admitted the officers into his home. The State has contended that the remarks allegedly made by Porter to "Go ahead and look around", or similar words, amounted to an intelligent waiver of his constitutional rights, freely and voluntarily given. The petitioner has contended from the beginning, that this is not the case. The District Court, in its Order set forth in the Appendix, has made an exhaustive, intelligent and correct interpretation and discussion of the question of intelligent waiver and consent. In this matter, the State has failed to meet any of the tests which would go to show consent. Every witness presented by the State on the trial of this matter, admits that at no time was Porter advised of his rights, or in any way, cautioned about his rights not to discuss the case or to consent to a search, or to make any move, whatsoever in cooperating with the authorities. The chief officer present at the arrest, testified as follows:

"Q. When you finally gained admittance you placed Porter under arrest at that time?

A. Yes, sir.

Q. Did you then advise him of his constitutional rights?

A. Not at that time.

Q. When did you so advise him? At the Sheriff's Office?

A. I didn't advise him at any time. He was brought to the Sheriff's Office and I didn't talk to him much after that.

Q. But you placed him under arrest?

A. Yes, sir.

Q. From that point on you proceeded to search the house?

A. Yes, sir.

Q. Were you in the basement when the desk drawers were opened, and these things taken out?

A. I was in the basement, yes, sir."

We are unable to improve on the argument advanced by the District Judge in his Order. The District Judge found:

"The second question to be decided is whether the petitioner, by his alleged consent made valid an otherwise illegal search and seizure. Witnesses for the State testified that they went to Porter's door and asked to be admitted. **Porter asked the police officers if they had a search warrant and they replied they did not,** but that they had an arrest warrant and that he was under arrest. At this point Porter admitted the officers into his house. The police testified that they asked Porter if they could search the house and that he told them to 'go ahead' and look around, or words of similar import. The State contends that this conduct on the part of the petitioner was consent to the search and a waiver of his Fourth Amendment rights. The trial court agreed with the State's contention and ruled that Porter consented to the search; the South Carolina Supreme Court held that the evidence supported a finding of consent.

One may consent to a search and seizure made without a warrant.[1] He thereby waives his constitutional protections under the Fourth Amendment. However, before there can be a valid consent to the search

[1] *Channel v. United States,* 285 F. (2d) 217; *United States v. Vickers,* 387 F. (2d) 703 (4th Circ. 1967)

and a waiver of Fourth Amendment rights two things must exist. First the consent must be free and voluntary, that is, it must be shown that there was no coercion present. Secondly, the consent must be an intelligent waiver of one's constitutional rights; the one who gives his consent **must understand that he has a specific constitutional safeguard and he must intend to waive it.**[2] Consent therefore must consist of a free, voluntary and intelligent waiver of one's constitutional protections. It must be "freely and intelligently given."[3]

After considering the authorities, this court is of the opinion that, under the circumstances, Porter's words and conduct did not represent consent to the search. Consent, in circumstances such as these, is more than mere acquiescence in a course of conduct on the part of the arresting officers. It cannot be said that Porter's consent was 'freely and intelligently given'."[4]

The arresting officer does not have to inform the accused of his Fourth Amendment rights in order that those rights may be waived. Although specific warnings must be given before an accused can effectively waive his Fifth and Sixth Amendment rights under rules announced in *Miranda v. State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. (2d) 694, this rule has not been extended to Fourth Amendment protections. *United States v. Lewis,* 274 F. Supp. 184. However, it must be clearly shown that consent was voluntarily and intelligently given.[5]

In this case Porter was then placed under arrest and then the police officers were admitted into his house.

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[2] This is "the law". The average criminal, and especially the habitual criminal, could care less about the Constitution. His only contact with the Constitution comes when his lawyer, or a court, finds the Constitution provides an avenue of escape (usually because of official omission) from the just deserts of his crime. And among crime's most vociferous allies are the "bleeding hearts" the "overeducated" and the "do-gooders." Despite this constitutional rights of every accused must be protected.

[3] *Judd v. United States,* 89 U. S. App. D. C. 64, 190 F. (2d) 649; *Johnson v. United States,* 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436.

[4] *Judd v. United States,* 89 U. S. App. D. C. 64, 190 F. (2d) 649; *Johnson v. United States,* 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436.

[5] *Judd v. United States, supra.*

No one informed Porter of his specific constitution protections under the Fourth Amendment. At this point, if Porter had been informed of his rights under the Fourth Amendment, it could be said that he had 'specifically and intelligent', if not 'freely and voluntarily' waived his constitution protections. This was not done.

Porter was under arrest when his alleged consent was given. The fact is particularly important in regard to the questioned coercion. In *Judd v. United States, supra*, The United States Court of Appeals for the District of Columbia said:

> "Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied.
>
> "The burden is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such situations; true consent, free of fear or pressure, is not so readily to be found. *United States v. Novero,* D. C. 58 Supp. 275; *United States v. McCurn,* D.C.D.N.Y. 1930 40 F. (2d) 295. . .
>
> ". . . His statements while in jail, which are relied upon as consent, may be summarized as follows: I have nothing to hide, you can go there and see for yourself. Conceivably again, it is but the false bravado of the smalltime criminal. But, however, it be characterized, it hardly establishes willing agreement that the officers search the house without first procuring a warrant. "(3) For example, Officer Friel testified: "We asked him (Judd) if we could go over (to his home) and he said yes."' It seem obvious that there was not

much else Judd could say under the circumstances. Similarly, where Officer Friel testified: "I asked him if he minded us going over to his room and taking a look, and he said no."

Likewise in *Higgins v. United States*, 209 F. (2d) 819, the Court observed:

> "If a valid confession proceeds a search by police, permission may show true consent to the search . . . But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by denial of guilt, do not show consent; at least in the absence of some extraordinary circumstance . . .
>
> "*Johnson vi United States,* 333 U. S. 10, 688 S. Ct. 367, 92 L. Ed. 436, illustrates the principle. There policemen knocked on the door and "a voice inside asked who was there. 'Lieutenant Bellard' was the reply. There was a slight delay. . . . and then defendant opened the door. The officer said, I want to talk to you a little bit.' She then, as he describes it, stepped back acquiescently and admitted us . . . The Supreme Court held that the search which followed was unlawful and the evidence should have been suppressed. The Court said: "Entry to the defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than on an outstanding and intentional waiver of a constitutional right . . ."

In *United States v. Page,* 302 F. (2d) 81, the Ninth Circuit of Appeals, sitting *en banc* stated the Rules cogently and concisely as follows:

> "The government must prove that consent was given. It must be shown that there was no duress

> or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently' given. There must be convincing evidence that the defendant has waived his rights. There must be clear and positive testimony. 'Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.' Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact. The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." (Citations omitted.)

In the present case police went to Porter's house, asked to be admitted. He asked them if they had a search warrant. This would indicate that at this point, before a situation arose in which coercion could be present, Porter did not intend to voluntarily consent to a search of his house.

In any case, Porter was placed under arrest and the police officers were admitted. Then, immediately after having been placed under arrest and while confronted by five police officers, Porter was asked if he would mind if the officers looked around. Porter said "go ahead or help yourself." Coercion is implicit in situations where consent is obtained under color of badge [6] and the government must show that there was no coercion in fact.

Both entry and consent were obtained under color of badge; also Porter was under arrest when he consented. It has been repeatedly held that overt words and conduct which manifest consent in situation such as this one, may not be enough to constitute waiver of the protections of the Fourth Amendment.

The burden is upon the government to clearly establish that consent was given without coercion or duress and also that it was an intelligent waiver of a specific constitutional right. The government here failed to establish either.

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[6] *United States v. Page, supra.*

The Court of Appeals for the Fourth Circuit recently ruled that where an individual freely and intelligently consents, a search and seizure may be made without a search warrant. *United States v. Vickers,* 387 F. (2d) 703 (1967). In the *Vickers* case, that court found that the suspect had consented to the search thereby waiving his Fourth Amendment protections.

The *Vickers* case, however, is distinguishable from the case at bar. In *Vickers,* the suspect was a postal employee who had pilfered money from the mails. Suspecting Vickers, the government marked certain notes and sent them through the mail in such a way that they would pass through Vicker's hands. As expected Vickers converted the letters. He removed the money contained in the letters and placed it in his pockets. Vickers was then asked to accompany the investigators to the Postal Inspector's Office where he was informed that an investigation was in progress and asked if he had any knowledge of the missing mail. Vickers replied that he did not. He was then asked if he had any objection to showing the investigators the contents of his pockets; Vickers replied that he had no objection and emptied his pockets. The contents included the notes which had been marked and posted.

In *Vickers,* the Fourth Circuit noted that suspect knew that he had no stolen letters or envelopes in his possession. He had only the money which he did not know had been marked. Therefore, Vickers was probably confident that he had nothing on his person which would incriminate him. The Court said, "Consent searches have often been upheld where a defendant was unaware that a search would produce evidence against him". (Citations omitted.) In the case at bar, the accused knew that a search of his house would reveal evidence of a betting operation. Porter must have been aware the notes, blank betting cards and other gambling paraphernalia were present. This Court is reminded of the langauge of *Higgins v. United States, supra,* where the court said, "But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be dis-

covered." This difference in the factual circumstances is sufficient to distinguish the present case from the *Vickers case.* However, *Vickers* and the instant case are further distinguishable for another reason.

In *Vickers,* the suspect was not under arrest, whereas, in the case at bar, Porter had been placed under arrest when his alleged consent was given. As noted above it has been held on numerous occasions that the circumstances of the accused's arrest is significant in regard to the question of coercion. "The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." *Judd v. United States, supra.*

Each case, in which consent is relied upon as a waiver of constitutional protections, turns upon its own facts. This Court finds that the circumstances of the case before it do not justify a finding that petitioner's course of conduct represented consent to the otherwise illegal search and seizure.

SUMMARY

The questions herein presented are of obvious importance to the administration of justice and the conduct of criminal investigation. The record of this case clearly shows a violation of due process in several areas of the proceedings and these departures from due process go to the very heart of the fundamental foundation required in the conduct of criminal justice. The decision of the Court below is believed to be erroneous. The petitioner has asserted in the Courts below, and is asserting here, rights guaranteed to the petitioner by the Constitution of the United States of America and is, of the opinion that he has shown violations of these rights. It is obvious from the record that the petitioner would not have been convicted, had illegally seized evidence not been admitted into evidence. It is also obvious that this evidence was secured by the State Police in violation of the rights and guarantees afforded petitioner by the United States Constitution. Unless Certiorari is

granted by this Court, the rights of petitioner will stand as violated and this can only be remedied by this Court applying its standard of measurement to the illegal evidence used against him in the Courts below. The establishment of uniform requirements of due process to insure proper ajudication of criminal justice in State criminal trial warrants remedial action by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

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INDEX TO APPENDIX

PAGE

Order of U. S. District Court—Robert H. Hemphill, Judge 21

Order of U. S. Court of Appeals, Fourth Circuit 32

ORDER OF U. S. DISTRICT COURT FOR SOUTH CAROLINA

This action, in which petitioner seeks the Great Writ, originated in Greenville County, South Carolina. Porter, his wife and several children resided in a private dwelling just outside of the City of Greenville. On December 31, 1965, the petitioner was in his residence with his wife and children when officers of the State Law Enforcement Division and officers of the Greenville County Sheriff's Department knocked at the door of the residence. The petitioner answered the door and was told that the police wanted in. He asked the officers if they had a Search Warrant and was told that they had none. The officers then informed him that they had an Arrest Warrant and that he was under arrest. They entered the residence and, according to the officers, asked permission to search. Permission was verbally given and the officers searched the premises. They seized notes, blank betting cards and other alleged gambling paraphernalia and took money petitioner's wife gave from her pocketbook. Both the seized physical evidence and the money was later introduced against petitioner on trial, over petitioner's objection. It was admitted by the police officers that there was no Search Warrant and that they did not advise the petitioner of his right to remain silent, or his right to an attorney. There was no interrogation.

When being cross examined as to the arrest itself (Tr., p. 51) Greenville County Deputy Sheriff Bill Coleman testified as follows:

> "Q. You knew exactly what you were looking for, did you not?
>
> A. Yes, sir.
>
> Q. Did you make the statement—did I understand you correctly to say you went to Mr. Porter's house to serve a warrant and quote 'see what evidence we could pick up at the house?'
>
> A. Yes, sir.
>
> Q. You are an experienced officer?
>
> A. Well, I've been on the force about ten and a half years.

Q. You've had occasion to make any arrests, have you not?

A. Yes, sir.

Q. You knew exactly what you were going up there to pick up?

A. I knew we were hunting gambling paraphernalia.

Q. At no time did you have a search warrant, did you?

A. No, sir."

Upon the trial of the matter, and again at the completion of the State's case, all appropriate motions were made and refused by the court. The petitioner offered no testimony or evidence in his own behalf. He was found guilty. Motions for a new trial and for a setting aside of the verdict were made and refused. An appeal was taken to the South Carolina Supreme Court on the questions presented herein and other questions of law. The conviction was affirmed and rehearing was denied. Petition for Writ of Certiorari to the United States Supreme Court was denied. The petitioner is now in the Greenville County Jail and the matter is before the United States District Court on Petition for a Writ of *Habeas Corpus*.

There are two issues raised by the introduction of the evidence in controversy and the objections thereto. They are (1) was the search and seizure, though made without a search warrant, valid because made contemporaneously with an incident to lawful arrest and (2), assuming the search and seizure to be illegal, was it made valid by petitioner's alleged consent—that is, did Porter, by his consent, waive his constitutional protection? On appeal to the South Carolina Supreme Court both issues were raised and both were decided against petitioner.[1]

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[1] The *State v. Lynn Porter*. Opinion No. 18818, filed August 13, 1968:

> While the inquiry of the defendant as to a search warrant and his subsequent statement to the officers to go ahead and look around, amply support a finding, as contended by the State, that the defendant thereby consented to the search, we think there is another principle, assuming there was no consent, which makes the exclusionary rule in *Mapp* clearly inapplicable here. It was thus stated in the case of *State v. Swilling*, 249 S. C. 541, 155 S. E. (2d) 607,

This court delights in the reasoning of this opinion. It recognizes and appreciates, the responsibility of the State tribunal to determine the law. Unfortunately, when the policy of the highest court in the land expressed itself by a continuing refusal to review issues of the nature here, after the highest court of the State had reviewed, it placed the Federal trial court—one jurist—instead of a court of appellate authority—in the unfortunate role of a court of review. Such a detour is easy, but it places a heavy burden on the single judge. The Federal trial court should not be burdened with the authority, or the task, of looking over the shoulders of a State court of review (in South Carolina composed of five *experienced* and dedicated professionals). But a bench of one, at the level of trial, cannot change, indeed is by tradition forbidden to write, judicial policy. Be that as it may, this court proceeds to discharge its responsibility. The edicts, the directions, the mandates of the Supreme Court of the United States, *are* the law of the land, and the directions to this court.

The South Carolina Supreme Court held that the search and seizure was valid because incident to and contemporaneous with a legal arrest. There are a great many authorities which support this position. It is well established that, under certain circumstances, police officers may

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quoting from 47 Am. Jur., Searches and Seizures, Section 19 (Cumulative Supplement):

> "When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. The right to search and seize incident to a lawful arrest and without a warrant extends to things under the accused's immediate control and, to an extent depending on the circumstances of the case, to the place where he is arrested."

The articles in question were obtained without a search warrant, but incident to a lawful arrest, from the place where defendant was arrested and where it was charged that the unlawful gambling activities were carried on. The house was under defendant's control and the search was confined solely to implements used in the commission of the crime. Under these circumstances, the search of the residence of defendant was not unlawful so as to make inadmissible the articles so obtained. *Harris v. United States*, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399. There will be found an excellent annotation in 19 A. L. R. (3d) 727 in which recent cases are collected dealing with the validity of nonconsensual searches and seizures conducted without a search warrant following a lawful arrest.

make a reasonable search incident to a lawful arrest. The scope of permitted search extends to the premises where the accused is arrested and which is under his immediate control. See *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 and 19 A. R. L. (3d) 727.

The court, however, is impressed by the fact that the police officers knew that they were going to make a search when they went out to Porter's house. Porter had been under investigation for some time and the police officers knew the nature of his operations. They had reason to believe Porter was carring on a betting operation and carrying it on in his house. The police, therefore, knew they were going to search for betting paraphernalia. Since they knew what they were looking for and had ample time, they could have easily obtained a search warrant. Instead they obtained an arrest warrant and used it to enable them to make a search of the premises.

This court is of the opinion that the police officers here should have obtained a search warrant. The facts in this case closely parallel the facts in *Trupiano v. United States,* 334 U. S. 699, 92 L. Ed. 1663. In *Trupiano* the police officers knew that defendants were engaged in producing illegal whiskey. Although there was ample time and opportunity for the police officers to obtain a search warrant and they knew what equipment they would be searching for as evidence of the illegal whiskey operation, they failed to procure a search warrant. The officers, however, did make a search of the premises contemporaneously with a valid arrest of the accused. In ruling that the activities of the policies officers constituted illegal search and seizure in violation of the Fourth Amendment, the court said:

> "But we cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable. . . . This rule rests on the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed

upon such activities . . . In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are unlikely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed . . .

"We do not take occasion here to re-examine the situation involved in *Harris v. United States.* The instant case relates only to the seizure of contrabrand the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest. That circumstances was wholly lacking in the *Harris* case, which was concerned with the permissible scope of a general search without a warrant as an incident to a lawful arrest. Moreover, the *Harris* case dealt with the seizure of government property which could not have been found unexpectedly during the course of a search." (Citations omitted.)

This court feels that the facts of the instant case fall within the rule of *Trupiano v. United States.* The police officers should have obtained a search warrant and the evidence found at Porter's house was therefore found as a result of an illegal search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

The second question to be decided is whether the petitioner by his alleged consent made valid an otherwise illegal search and seizure. Witnesses for the State testified that they went to Porter's door and asked to be admitted. **Porter asked the police officers if they had a search warrant and they replied that they did not,** but that they had an arrest warrant and that he was under arrest. At this point Porter admitted the officers into his house. The police testified that they asked Porter if they could search the house and that he told them to "go ahead" and look around, or words of similar import. The State contends that his conduct on the part of the petitioner was consent to the search and a waiver of his Fourth Amendment rights. The trial court agreed with the State's contention and ruled that Porter

consented to the search; the South Carolina Supreme Court held that the evidence supported a finding of consent.

One may consent to a search and seizure made without a warrant.[2] He thereby waives his constitutional protections under the Fourth Amendment. However, before there can be a valid consent to the search and a waiver of Fourth Amendment rights two things must exist. First the consent must be free and voluntary, that is, it must be shown that there was no coercion present. Secondly, the consent must be an intelligent waiver of one's constitutional rights; the one who gives his consent **must understand that he has a specific constitutional safeguard and he must intend to waive it.**[3] Consent therefore must consist of a free, voluntary and intelligent waiver of one's constitutional protections. It must be "freely and intelligently given."[4]

After considering the authorities, this court is of the opinion that, under the circumstances, Porter's words and conduct did not represent consent to the search. Consent, in circumstances such as these, is more than mere acquiescence in a course of conduct on the part of the arresting officers. It cannot be said that Porter's consent was "freely and intelligently given."[5]

The arresting officer does not have to inform the accused of his Fourth Amendment rights in order that those rights may be waived. Although specific warnings must be given before an accused can effectively waive his Fifth and Sixth Amendment rights under rule announced in *Miranda v. State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. (2d) 694, this rule has not been extended to Fourth Amendment protections. *United States v. Lewis,* 274 F. Supp. 184.

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[2] *Channel v. United States,* 285 F. (2d) 217; *United States v. Vickers,* 387 F. (2d) 703 (4th Cir. 1967).

[3] This is "*the law.*" The average criminal, and especially the habitual criminal, could care less about the Constitution. His only contact with the Constitution comes when his lawyer, or a court, finds the Constitution provides an avenue of escape (usually because of official omission) from the just deserts of his crime. And among crime's most vociferous allies are the "bleeding hearts" the "overeducated" and the "do-gooders." Despite this the constitutional rights of every accused must be protected.

[4] *Judd v. United States,* 89 U. S. App. D. C. 64, 190 F. (2d) 649. *Johnson v. United States,* 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436.

[5] *Judd v. United States, supra,* note 4. *Johnson v. United States, supra, supra,* note 4.

However, it must be clearly shown that consent was voluntary and intelligently given.[6]

In this case Porter was then placed under arrest and then the police officers were admitted into his house. No one informed Porter of his specific constitution protections under the Fourth Amendment. At this point, if Porter had been informed of his rights under the Fourth Amendment, it could be said that he had "specifically, and intelligently", if not "freely and voluntarily," waived his constitution protection. This was not done.

Porter was under arrest when his alleged consent was given. That fact is particularly important in regard to the questioned coercion. In *Judd v. United States, supra,* the United States Court of Appeals for the District of Columbia said:

> "Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be established that there was no duress or coercion, actual or implied.
>
> "The burden is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such situations; true consent, free of fear or pressure, is not so readily to be found. *United States v. Novero,* D. C., 58 F. Supp. 275; *United States v. McCurn,* D. C., D. N. Y. 1930, 40 F. (2d) 295. . . .
>
> ". . . His statements while in jail, which are relied upon as consent, may be summarized as follows: I have nothing to hide, you can go there and see for yourself. Conceivably, this is the calm statement of an innocent man; conceivably, again, it is but the false bravado of the small-time criminal. But, however, it be characterized, it hardly establishes willing agreement that the officers search the house without first procuring a warrant. [3]

[6] *Judd v. United States, supra.*

"[3] For example, Officer Friel testified: "We asked him [Judd] if we could go over [to his home] and he said yes." It seems obvious that there was not much else Judge could say under the circumstances. Similarly, where Officer Friel testified: "I asked him if he minded us going over to his room and taking a look, and he said no."

Likewise in *Higgins v. United States,* 209 F. (2d) 819, the court observed:

"If a valid confession precedes a search by police, permission may show true consent to the search . . . But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by denial of guilt, do not show consent; at least in the absence of some extraordinary circumstance . . .

"*Johnson v. United States,* 333 U. S. 10, 688 S. Ct. 367, 92 L. Ed. 436, illustrates the principle. There policemen knocked on the door and "a voice inside asked who was there. 'Lieutenant Belland' was the reply. There was a slight delay . . . and then defendant opened the door. The officer said, 'I want to talk to you a little bit.' She then, as he describes it, stepped back acquiescently and admitted us. . . . The Supreme Court held that the search which followed was unlawful and the evidence should have been suppressed. The Court said: "Entry to the defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted insubmission to authority rather than on an understanding and intentional waiver of a constitutional right . . ."

In *United States v. Page,* 302 F. (2d) 81, the Ninth Circuit of Appeals, sitting *en banc* stated the rules cogently and concisely as follows:

"The government must prove that consent was given. It must be shown that there was no duress or

coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently' given. There must be convincing evidence that the defendant has waived his rights. There must be clear and positive testimony. 'Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.' Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact. The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." (Citations omitted.)

In the present case police went to Porter's house asked to be admitted. He asked them if they had a search warrant. This would indicate that at this point, before a situation arose in which coercion could be present, Porter did not intend to voluntarily consent to a search of his house.

In any case Porter was placed under arrest and the police officers were admitted. Then, immediately after having been placed under arrest and while confronted by five police officers, Porter was asked if he would mind if the officers looked around. Porter said, "go ahead or help yourself." Coercion is implicit in situations where consent is obtained under color of badge and the government must show that there was no coercion in fact.[7]

Both entry and consent were obtained under color of badge; also Porter was under arrest when he consented. It has been repeatedly held that overt words and conduct which manifest consent, in situations such as this one, may not be enough to constitute waiver of the protections of the Fourth Amendment.

The burden is upon the government to clearly establish that consent was given without coercion or duress and also that it was an intelligent waiver of a specific constitutional right. The government here failed to establish either.

The Court of Appeals for the Fourth Circuit recently ruled that where an individual freely and intelligently consents, a search and seizure may be made without a search warrant. *United States v. Vickers,* 387 F. (2d) 703 (1967).

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[7] ***United States v. Page, supra.***

In the *Vickers* case, that court found that the suspect had consented to the search, thereby waiving his Fourth Amendment protections.

The *Vickers* case, however, is distinguishable from the case at bar. In *Vickers,* the suspect was a postal employee who had pilfered money from the mails. Suspecting Vickers, the government marked certain notes and sent them through the mail in such a way that they would pass through Vickers' hands. As expected Vickers converted the letters. He removed the money contained in the letters and placed it in his pockets. Vickers was then asked to accompany the investigators to the Postal Inspector's Office where he was informed that an investigation was in progress and asked if he had any knowledge of the missing mail. Vickers replied that he did not. He was then asked if he had any objection to showing the investigators the contents of his pockets; Vickers replied that he had no objection and emptied his pockets. The contents included the notes which had been marked and posted.

In *Vickers,* the Fourth Circuit noted that suspect knew that he had no stolen letters or envelopes in his possession. He had only the money which he did not know had been marked. Therefore, Vickers was probably confident that he had nothing on his person which would incriminate him. The court said, "Consent searches have often been upheld where a defendant was unaware that a search would produce evidence against him." (Citations omitted.) In the case at bar, the accused knew that a search of his house would reveal evidence of a betting operation. Porter must have been aware the notes, blank betting cards and other gambling paraphernalia were present. This court is reminded of the language of *Higgins v. United States, supra,* where the court said, "But no man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." This difference in the factual circumstances is sufficient to distinguish the present case from the *Vickers* case. However, *Vickers* and the instant case are further distinguishable for another reason.

In *Vickers,* the suspect was not under arrest, whereas, in the case at bar Porter had been placed under arrest when

his alleged consent was given. As noted above it has been held on numerous occasions that the circumstance of the accused's arrest is significant in regard to the question of coercion. "The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." *Judd v. United States, supra.*

Each case, in which consent is reled upon as a waiver of constitutional protections, turns upon its own facts. This court finds that the circumstances of the case before it do not justify a finding that petitioner's course of conduct represented consent to the otherwise illegal search and seizure.

In view of petitioner's obvious guilt, this court is reluctant to hold that evidence upon which he was convicted was the result of an illegal search and seizure. As reluctant as it is to make its decision, this court realizes that such a result is necessary to preserve the integrity of our American constitutional system, based as it is upon fundamental concepts of due process of law and the guarantees of individual liberty contained in the Bill of Rights. This court cannot be allowed, by its opinion as to the guilt of the accused to be drawn into a course of action which would be a denial of due process and which at some later date might be used as a precedent in suppression of the Fourth Amendment protections against illegal search and seizure. The very heartbeat of the presumption of innocence has a sits constitutional pacemaker [8] the requirement of due process. As interpreted by the Supreme Court of the United States, due process has here been violated.

Petitioner is entitled to relief. Respondent is directed to release petitioner.

AND IT IS SO ORDERED.

/s/ ROBERT W. HEMPHILL,
United States District Judge.

Columbia, South Carolina,
April 14, 1969.

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[8] Nature's electrical impulse, or the improvision of science in the artificial, which regulates the rhythm of the heart pump in the human body.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 13,597

LYNN PORTER, APPELLEE,

versus

JOHN P. ASHMORE, JR., GREENVILLE COUNTY SUPERVISOR, A. C. THOMPSON, GREENVILLE COUNTY JAILER, WILLIAM D. LEEKE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND THE STATE OF SOUTH CAROLINA, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA, ROBERT W. HEMPHILL, DISTRICT JUDGE.

(Argued November 7, 1969 Decided February 10, 1970)

BEFORE SOBELOFF, BORMAN and CRAVEN, Circuit Judges

C. TOLBERT GOOLSBY, JR., Assistant Attorney General of South Carolina, (DANIEL R. MCLEOD, Attorney General of South Carolina, EMMETT CLAIR, Assistant Attorney General of South Carolina, B. O. THOMASON, JR., Solicitor, Thirteenth Judicial Circuit, and H. F. PARTEE, Assistant Solicitor, Thirteenth Judicial Circuit, on brief) for Appellants, and KALE R. ALEXANDER, (DAVID A. FEDOR on brief) for Appellee.

CRAVEN, Circuit Judge:

Lynn Porter was convicted of occupying a house containing gambling paraphernalia in violation of S. C. Code of Laws § 16-515 (2) (1962). The South Carolina Supreme Court affirmed his conviction. *State v. Porter,* 251 S. C. 393, 162 S. E. (2d) 843 (1968), *cert. denied,* ——— U. S. ——— (1969). On petition for a writ of habeas corpus, the district court adjudged Porter's conviction unconstitutional on the ground that a search of his home

incident to the arrest was overbroad. The court held that the unconstitutional search, in turn, required the exclusion of evidence seized and offered to prove Porter's guilt. The state appealed. We reverse.

Ted M. Owens, an agent with the South Carolina Law Enforcement Division, was assigned to investigate gambling activity in Greenville County, South Carolina, on August 24, 1965. He testified at Porter's trial that he received, from a "reliable source," the telephone number of a party accepting bets on baseball and football games. He called the number and began placing bets with the party who answered; on the stand he identified the voice on the phone as that of Lynn Porter. Owens made wagers on a weekly basis with Porter through December 1965, usually placing the bets by phone and leaving the money bet at the desk of the Imperial 400 motel. Someone, inferentially Porter, would later pick up the money at the motel.

On December 29, 1965, Owens received information that Porter had gambling paraphernalia and parlay cards at his home. He then signed an arrest warrant for Porter and proceeded, with four other officers, to Porter's residence. According to the officers, Mrs. Porter answered the officers' knock at the door by pushing it open slightly. Seeing the police outside, she shut the door and went away. Porter himself then came to the door and asked whether the officers had a search warrant. They told him they had an arrest warrant, and Porter opened the door. The police stepped in and read the warrant to him. Lieutenant Coleman, one of the officers present, then told Porter that he wanted to look around, to which Porter is said to have replied, "Go ahead," or "Help yourself." The police then searched the premises. In a basement room some distance from the point of the arrest they found a phone with four or five incoming lines, some parlay cards, dice, playing cards, and "odds" books. The parlay cards and odds books were introduced at Porter's trial.

While the police were at the Porter's residence, Mrs. Porter requested that she be allowed to take her children and go to a neighbor's house. Before she left, however, the officers asked her whether she had any parlay cards, or

other gambling equipment, in her purse. She replied by offering to hand over her bag, but one of the police told her to open it instead. When she complied, the officer noticed a billfold inside and asked if there was money in it. Mrs. Porter took out $105 and gave it to the police, who told her they would have to hold the money until they could determine whether it was cash mailed to Porter by Owens. They subsequently confirmed, by an examination of the serial numbers, that part of the money had been sent to Porter on a "bet" placed by Owens. This money was also introduced at the trial.

Porter attacks his detention on two grounds: (a) that the search and seizure without a search warrant was invalid, even though made contemporaneously with and incident to a lawful arrest; (b) that he did not waive his constitutional protection by consenting to the search.

I

The district court ordered Porter's release prior to the decision in *Chimel v. California*, ——— U. S. ———, 23 L. Ed. (2d) 685 (1969), which held a search without a warrant impermissible if it extends beyond the arrestee's person and the area from which he can obtain a weapon, or obtain and destroy something that can be used as evidence against him. Consequently, we must determine whether *Chimel* is to apply retrospectively to the search in this case. We are convinced that it should apply only prospectively.

In *Linkletter v. Walker*, 381 U. S. 618 (1965), the Supreme Court held the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), inapplicable to cases finally decided prior to *Mapp*. The Court in *Linkletter* enumerated three considerations proper in deciding an issue of retrospectivity: the purpose of the rule being considered, the reliance placed upon the previous rule or doctrine, and the effect of a retrospective application on the administration of justice. See *Linkletter v. Walker*, 381 U. S. at 636 (1965); see also *Stovall v. Denno*, 388 U. S. 293 (1967). As applied to *Mapp*, these considerations dictated a prospective application. Since *Chimel* is merely an extension of the *Mapp* exclusionary rule to a new situation, it is

clear, we think, that prospective application of the former rule is also required.

In *Linkletter* the Court stated that it would not serve the purpose of the exclusionary rule to apply it retrospectively. The purpose of the rule, of course, is not to exclude untrustworthy evidence from the jury, but to deter unlawful police conduct. Prior police activity cannot be corrected by retrospective application of an exclusionary rule. Deterrence of future conduct will be served as well by prospective application. The same reasoning is applicable to the extension of the exclusionary rule in *Chimel.*

The Court in *Linkletter* also pointed out that the states had relied heavily on the doctrine of *Wolf v. Colorado,* 338 U. S. 25 (1949), prior to *Mapp* and concluded that retrospective application of the exclusionary rule would unduly tax the administration of justice. Similarly, before *Chimel* a "reasonable" search incident to a lawful arrest, but without a search warrant, was valid, even though it extended beyond the person and immediate vicinity of the person arrested. *United States v. Rabinowitz,* 339 U. S. 56 (1950); *Harris v. United States,* 331 U. S. 145 (1947). The state authorities were entitled to, and did, rely on the validity of a search so conducted. We hold the *Chimel* rule is to apply only to searches conducted after June 23, 1969, the date of decision in that case. Compare *Desist v. United States,* 394 U. S. 244, 22 L. Ed. 248 (1969); *Williams v. United States,* ——— F. (2d)——, 6 Cr. L. R. 2188 (9th Cir. 1969).

II

The validity of the search in this case must be determined under the rules promulgated in *United States v. Rabinowitz,* 339 U. S. 56 (1950), and *Harris v. United States,* 331 U. S. 145 (1947), both of which were overruled by *Chimel.* See 1969 Duke L. J. 1084. In *Harris,* five F.B.I. agents arrested the defendant in his apartment pursuant to valid arrest warrants. The agents had not obtained search warrants, but they searched the entire apartment and uncovered certain canceled checks. They also discovered eight draft classification cards and eleven registration certificates, which bore the stamp of a local draft board. The checks were related to the crime for which defendant was arrested,

but the cards and certificates were not. Nevertheless, on the basis of the evidence seized Harris was convicted for unlawful possession, concealment, and alteration of classification cards and registration certificates. The Supreme Court held the search and seizure valid, stating the test to be whether the search incident to a lawful arrest was reasonable under all the circumstances. The agents were present in the apartment lawfully, pursuant to valid arrest warrants, and their search was directed specifically to the means and instrumentalities by which the crime charged had been committed.[9] As a result, both the evidence sought and the evidence fortuitously discovered were held subject to seizure.

In *Rabinowitz,* government agents arrested defendant in his one-room office. The arrest was pursuant to a valid arrest warrant, but no search warrant had been issued. The agents searched the office for an hour and a half, uncovering and seizing 573 stamps on which "overprints" had been forged. The Court declared that the constitution prohibits only unreasonable searches and that the reasonableness of a search depends upon the circumstances of each case. Because the search and seizure were incident to a lawful arrest, the place searched was a business room to which the public was invited, the room was small and under the complete control of respondent, the search did not extend beyond the room, and the possession of the forged stamps was a crime, the Court declared the search reasonable.

In the case before us now the district court decision rests squarely on *Trupiano v. United States,* 334 699 (1948), which required that a search warrant be obtained where practicable. *Rabinowitz,* however, specifically overruled *Trupiano* to the extent that it required a search warrant where reasonable to procure one, rather than merely requiring the search itself to be reasonable. Under the rule of *Harris* and *Rabinowitz* it is clear that a search incident to a lawful arrest may extend beyond the immediate vicinity of the one arrested. How far a pre-*Chimel*

[9] The Court, in its opinion, refers to the so-called mere evidence rule, which was subsequently overruled in *Warden v. Hayden,* 387 U. S. 294 (1967). The applicability of Harris to the present search is not affected by the demise of the mere evidence rule, since the police here were searching specifically for gambling paraphernalia.

search may ultimately extend depends entirely on the facts of each case. In this case the search was reasonable under all the circumstances because: (1) the officers were conducting a search for specific evidence (gambling paraphernalia, parlay cards, and bills with particular serial numbers), not a general exploratory search with no definite aim in mind; (2) the search and seizure were incident to a lawful arrest, based on probable cause developed after extensive investigation; (3) there was, at the time of the arrest and search, no South Carolina statute authorizing the officers to obtain a search warrant for gambling paraphernalia;[10] (4) if the officers had not conducted the search, there was good reason to fear that the evidence would have been destroyed or concealed. Indeed, since the officers could not obtain a search warrant for the items, there would have been no method available to obtain the incriminating evidence; (5) finally, occupying a house containing gambling paraphernalia was the very crime for which Porter was being arrested, and, as a result, a search for the gambling paraphernalia within the house was entirely reasonable. Under a test of reasonableness, therefore, the search and seizure incident to a lawful arrest were valid, and the district court erred in directing Porter's release. Because the search and seizure were valid, we do not reach the issue of consent to the search.

REVERSED.

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[10] The absence of an authorizing statute would not, of course, legitimate a search where a warrant is constitutionally required—as, under the new rule promulgated by *Chimel v. California*, ... U. S. ..., 23 L. Ed. (2d) 685 (1969), where a warrant will be required in every instance for a search beyond the vicinity of the person arrested. We do not accept the argument that the absence of an authorizing statute demonstrated the South Carolina Legislature's intent that no search for gambling paraphernalia should be conducted in the state. This interpretation of the legislative intent is unreasonable in light of a statute making it illegal to occupy a house in which gambling paraphernalia is located. The South Carolina Legislature has, subsequent to this case, amended the law to allow the issuance of a search warrant for any property used in the commission of a crime. S. C. Code of Laws § 17-271 (1962), *as amended*, (1968 Supp.)

SUPREME COURT, U. S.

FILED

MAY 20 1970

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 110

LYNN PORTER, PETITIONER,

versus

JOHN P. ASHMORE, JR., GREENVILLE COUNTY SUPERVISOR, A. C. THOMPSON, GREENVILLE COUNTY JAILOR, WILLIAM D. LEEKE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND THE STATE OF SOUTH CAROLINA, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Argument:	
I. The search for and seizure of gambling paraphernalia by law enforcement officers from the house of the petitioner without a search warrant should be sustained as a search and seizure properly made incidental to and contemporaneously with a lawful arrest	5
II. The search for and seizure of gambling paraphernalia by law enforcement officers from the house of the petitioner without a search warrant should be sustained because the petitioner knowingly and intelligently consented to that search and seizure	12
Conclusion	16

CITATIONS

Cases: PAGE

Abel v. United States, 362 U. S. 217 (1960) 7

Chimel v. California, ... U. S. ..., 23 L. Ed. (2d) 685 (1969) 5, 8, 10, 11

Derouen v. Sheriff, ... Nev. ..., 6 Cr. L. R. 2246 (1969) 11

Desist v. United States, 394 U. S. 244 (1969) 11

Harris v. United States, 331 U. S. 145 (1947) 5, 7

Higgins v. United States, 209 F. (2d) 819 (D. C. Cir. 1954) 14

Johnson v. Zerbst, 304 U. S. 458 (1938) 10

Jordan v. United States, 416 F. (2d) 338 (9th Cir. 1969), cert. denied, ... U. S. ..., 38 L. W. 3320 (1970) 11

Judd v. United States, 190 F. (2d) 649 (D. C. Cir. 1951) 15

Lyon v. United States, 416 F. (2d) 91 (5th Cir 1969) .. 11

Kremen v. United States, 353 U. S. 346 (1957) 7, 8, 9

Matthews v. United States, 407 F. (2d) 1371 (5th Cir. 1969) 8

People v. Edwards, ... Cal. ..., 453 P. (2d) 713 (1969) 11

People v. Herrera, ... Mich. App. ..., 172 N. W. (2d) 529 (1969) 11

Porter v. Ashmore, 298 F. Supp. 951 (D. C. S. C. 1969) 3

Porter v. Ashmore, ... F. (2d) ..., (4th Cir. 1970) ... 3

Porter v. State of South Carolina, 393 U. S. 1079 (1969) 2, 4

Post v. Boles, 332 F. (2d) 738 (4th Cir. 1964) 10

Robbins v. MacKenzie, 364 F. (2d) 45 (1st Cir. 1966), cert. denied, 385 U. S. 913 (1966) 16

Scott v. State, 7 Md. App. 505, 256 A. (2d) 384 (1969) . 11

CITATIONS—Continued

PAGE

Shipley v. California, ... U. S. ..., 23 L. Ed. (2d) 732 (1969) 8

State v. Porter, 251 S. C. 393, 162 S. E. (2d) 843 (1968) 2

Thornton v. State, ... Tex. ..., 6 Cr. L. R. 2389 (1970) 11

United States v. Bennett, 415 F. (2d) 113 (2d Cir. 1969) 11

United States v. Blassick, ... F. (2d) ..., 6 Cr. L. R. 2411 (7th Cir. 1970) 11

United States v. Bunch, ... U. S. C. M. A. ..., 6 Cr. L. R. 2452 (1970) 11

United States v. Gorman, 355 F. (2d) 151 (2d Cir. 1965), cert. denied, 384 U. S. 1024 (1966) 14, 15

United States v. Rabinowitz, 339 U. S. 56 (1950) 5, 6

United States v. Thompson, 356 F. (2d) 216 (2d Cir. 1965) 15

United States v. Vickers, 387 F. (2d) 703 (4th Cir. 1967) 13

Von Cleef v. New Jersey, ... U. S. ..., 23 L. Ed. (2d) 728 (1969) 7, 8, 9, 11

Wade v. Warden, 278 F. Supp. 904 (D. C. Md. 1968) ... 16

Williams v. United States, 418 F. (2d) 159 (9th Cir. 1969) 11

Code of Laws of South Carolina:

S. C. Code § 16-515(2) (1962) 2

S. C. Code § 17-271 (1962), as amended (1968 Supp.) 4

Statute at Large:

54 STAT. Act No. 908 § 1 (1966) 4

Annotation:

9 A. L. R. (3d) 858 (1966) 13

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1310

LYNN PORTER, PETITIONER,

versus

JOHN P. ASHMORE, JR., GREENVILLE COUNTY SUPERVISOR, A. C. THOMPSON, GREENVILLE COUNTY JAILOR, WILLIAM D. LEEKE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND THE STATE OF SOUTH CAROLINA, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. of Petition at 21) is reported at 298 F. Supp. 951. The opinion of the Court of Appeals for the Fourth Circuit (App. of Petition at 32) has yet to be reported. The opinion of the Supreme Court of South Carolina is reported at 251 S. C. 393, 162 S. E. (2d) 843.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether or not the search for and seizure of gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should be sustained as a search and seizure properly made incidental to and contemporaneously with a lawful arrest?

2. Whether or not the search for and seizure of gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should be sustained because the petitioner knowingly and intelligently consented to that search and seizure.

STATEMENT

The petitioner was tried and convicted upon an indictment which charged him with having violated Section 16-515(2) of the South Carolina Code of Laws, a statute which renders it unlawful for one to occupy in South Carolina a building within which there is contained gambling paraphernalia.[1] His conviction was affirmed by the Supreme Court of South Carolina, *State v. Porter,* 251 S. C. 393, 162 S. E. (2d) 843 (1968), and this Court subsequently denied *certiorari. Porter v. State of South Carolina,* 393 U. S. 1079 (1969). On April 14, 1969, however, the United States District Court for the District of South Carolina, Columbia Division, following a hearing upon a writ of *habeas corpus,* declared the search for and seizure of gambling parapher-

[1] "Any person within this State who:

* * *

"(2) Keeps or occupies any room, shed, tenement, booth, building, float, or vessell, or any part thereof, or occupies any place or stand of any kind upon any public or private grounds within this State with books, papers, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling pools;

* * *

"Shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding six months, or both fine and imprisonment, in the discretion of the Court." CODE OF LAWS OF SOUTH CAROLINA § 16-515(2) 1962).

nalia by law enforcement officers from the petitioner's home unlawful. *Porter v. Ashmore,* 298 F. Supp. 951 (D. C. S. C. 1969). Porter's conviction was set aside by the District Court, and the respondents appealed. That appeal resulted in a reversal by the United States Court of Appeals for the Fourth Circuit of the District Court's order. *Porter v. Ashmore, et al.,* ... F. (2d) ... (4th Cir. 1970). Porter, for a second time, petitioned this Court for a writ of *certiorari.*

In its decision that reverses the United States District Court's order, the Circuit Court summarizes most of the facts which are involved in this case. *Viz.*:

> "Ted M. Owens, an agent with the South Carolina Law Enforcement Division, was assigned to investigate gambling activity in Greenville County, South Carolina, on August 24, 1965. He testified at Porter's trial that he received, from a 'reliable source,' the telephone number of a party accepting bets on baseball and football games. He called the number and began placing bets with the party who answered; on the stand he identified the voice on the phone as that of Lynn Porter. Owens made wagers on a weekly basis with Porter through December 1965, usually placing the bets by phone and leaving the money bet at the desk of the Imperial 400 motel. Someone, inferentially Porter, would later pick up the money at the motel.
>
> "On December 29, 1965, Owens received information that Porter had gambling paraphernalia and parlay cards at his home. He then signed an arrest warrant for Porter and proceeded, with four other officers, to Porter's residence. According to the officers, Mrs. Porter answered the officers' knock at the door by pushing it open slightly. Seeing the police outside, she shut the door and went away. Porter himself then came to the door and asked whether the officers had a search warrant. They told him they had an arrest warrant, and Porter opened the door. The police stepped in and read the warrant to him. Lieutenant Coleman, one of the officers present, then told Porter that he wanted to look

around, to which Porter is said to have replied, 'Go ahead,' or 'Help yourself.' The police then searched the premises. In a basement room some distance from the point of the arrest they found a phone with four or five incoming lines, some parlay cards, dice, playing cards, and 'odds' books. The parlay cards and odds books were introduced at Porter's trial.

"While the police were at the Porter residence, Mrs. Porter requested that she be allowed to take her children and go to a neighbor's house. Before she left, however, the officers asked her whether she had any parlay cards, or other gambling equipment in her purse. She replied by offering to hand over her bag, but one of the police told her to open it instead. When she complied, the officer noticed a billfold inside and asked if there was money in it. Mrs. Porter took out $105 and gave it to the police, who told her they would have to hold the money until they could determine whether it was cash mailed to Porter by Owens. They subsequently confirmed, by an examination of the serial numbers, that part of the money had been sent to Porter on a 'bet' placed by Owens. This money was also introduced at the trial." (App. of Petition at 33-34); compare, *State v. Porter, supra* at 397-399.

The respondents would add that at the time of Porter's arrest and the search of his home there was no statute in South Carolina that would have authorized the arresting officers to obtain a search warrant for gambling paraphernalia. (App. of Petition at 37); Code of Laws of South Carolina § 17-271 (1962), as amended (1968 Supp.); 54 STAT. Act No. 908 § 1 at 2268-2269 (1966).

Porter contends, as before, when he, upon basically the same record, petitioned this Court for a writ of *certiorari* directed to the Supreme Court of South Carolina, *Porter v. State of South Carolina,* 393 U. S. 1079 (1969), that the search of his home and the seizure of the gambling paraphernalia contained therein were unconstitutional. He main-

tains now, as then, that the search for and seizure of the gambling equipment and related articles by law enforcement officers from his home without a search warrant were invalid, even though made contemporaneously with and incidental to his lawful arrest. He further maintains now, as then, that at no time did he consent to that search and seizure.

ARGUMENT

I.

The search for and seizure of gambling paraphernalia by law enforcement officers from the home of the petitioner without a search warrant should be sustained as a search and seizure properly made incidental to and contemporaneously with a lawful arrest.

Incidental to and contemporaneously with the lawful arrest of the petitioner in his living room (App. at 32), a search was made of those premises upon which he was arrested and as to which he had possession and control. The search did not extend beyond the dwelling; and while it appears that Porter's whole house was searched, it was just from the dwelling's den in the basement and an adjacent room that the gambling things were seized. (App. at 21-22). Unless this case is controlled by *Chimel v. California,* ... U. S. ..., 23 L. Ed. (2d) 685 (1969), and another case decided with it that day, the constitutional validity of that search and seizure must be determined in accordance with the rule prescribed by this Court in *Harris v. United States,* 331 U. S. 145 (1947), and in *United States v. Rabinowitz,* 339 U. S. 56 (1950), a rule which prevailed on December 31, 1965, the date that the petitioner was arrested and his house searched. (App. at 13.)

The latter cases established the rule that the validity of a search made without a search warrant but incidental

to a lawful arrest depended upon the reasonableness of the search under all the circumstances. *E.g.*:

> "[T]here may be reasonable searches incident to an arrest without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances." *United States v. Rabinowitz, supra* at 65-66.

The Circuit Court concluded that the following facts and circumstances rendered the search in this case reasonable and, therefore, valid:

> "(1) The officers were conducting a search for specific e v i d e n c e (gambling paraphernalia, parlay cards, and bills with particular serial numbers), not a general exploratory search with no definite aim in mind; (2) the search and seizure were incident to a lawful arrest, based on probable cause developed after extensive investigation; (3) there was, at the time of the arrest and search, no South Carolina statute authorizing the officers to obtain a search warrant for gambling paraphernalia; (4) if the officers had not conducted the search, there was good reason to fear that the evidence would have been destroyed or concealed. Indeed, since the officers could not obtain a search warrant for the items there would have been no method available to obtain the incriminating evidence; (5) finally, occupying a house containing gambling paraphernalia was the very crime for which Porter was being arrested, and, as a result, a search for gambling paraphernalia within the house was entirely reasonable." (App. of Petition at 37.)

Other facts and circumstances which, it is submitted, made the search and seizure in this case reasonable and, hence, constitutional were: (1) the dwelling wherein the search was conducted and the seizure was made was under the petitioner's immediate control and was in his posses-

sion; (2) the search did not extend beyond the dwelling which was used for unlawful purposes and inside of which Porter was arrested (App. at 21-22); (3) the place of the search and seizure was a dwelling in which there lived others besides the petitioner and who, it is reasonable to assume, could have destroyed the gambling paraphernalia while Porter was in police custody, if not to aid him, then to avoid prosecution for having committed the same offense (App. at 32); (4) all items seized, except the money which was obtained from Porter's wife, were taken from the basement area of Porter's house (App. at 32); (5) the officers had a valid arrest warrant in their possession (App. at 15); and (6) the officers acted in good faith in accordance with their understanding of existing law (App. at 12).

We are aware, however, that *Von Cleef v. New Jersey*, ... U. S. ..., 23 L. Ed. (2d) 728 (1969), was also decided on June 23, 1969. Von Cleef was arrested on the third floor of a sixteen-room house in which she and her co-petitioner lived. Several policemen proceeded to search the entire house without a search warrant. The search took three hours [2] and yielded several thousand articles, letters, photographs, and other things which were later introduced in evidence by the prosecution. As it reversed the petitioners' convictions, this Court ruled:

> "[T]he action of the police here in combing a three-story 16-room house from top to bottom and carting away several thousand papers, publications, and other items cannot . . . be justified as 'incident to arrest.'" 23 L. Ed. (2d) at 731.

As authority for its holding in *Von Cleef*, this Court cited *Kremen v. United States*, 353 U. S. 346 (1957) and referred to *Abel v. United States*, 362 U. S. 217 (1960), a case in which the latter decision was commented upon and

[2] The search involved in *Harris v. United States*, *supra*, however, took approximately five hours. See, 331 U. S. at 149.

distinguished. In *Kremen,* agents of the Federal Bureau of Investigation, without a search warrant in their possession, made an exhaustive search of the cabin in which Kremen had shortly before been arrested and seized the cabin's entire contents. That search and seizure were regarded by this Court as beyond the sanction of any of its cases. The convictions of Kremen and the other petitioners were, therefore, set aside.

The facts that were involved in *Von Cleef,* while generally similar to those involved in *Kremen,* on close examination, differ considerably. Mr. Justice Harlan's dissent in *Von Cleef* makes that clear. See, 23 L. Ed. (2d) at 731. We can find no other decision of this Court which holds that where an abundance of relevant evidence is seized without a search warrant but pursuant to a lawful arrest and contemporaneously therewith, such evidence is illegally obtained and cannot be admitted in evidence. Cf. *Von Cleef v. New Jersey, supra* (Harlan, J. dissenting); *Shipley v. California,* ... U. S. ..., 23 L. Ed. (2d) 732 1969), (White, J. dissenting); *Matthews v. United States,* 407 F. (2d) 1371 (5th Cir. 1969). Since *Von Cleef* establishes, we believe, a new evidentiary exclusionary rule, that rule should not be applied here unless, like *Chimel,* it is to receive retrospective application.

The facts involved in the instant case and in *Kremen* are, respondents admit, similar in a few respects. In both cases, there was a seizure of a substantial quantity of items. In both cases, the arrest of each petitioner was lawful. In both cases, a dwelling house was the place in which each petitioner was arrested and in which the articles seized were found after a warrantless search. There are, however, some distinctions.

In *Kremen,* the officers made an indiscriminate search for evidence and seized the entire contents of the cabin in which they made their search. Here, the officers searched

for and seized only relevant evidence. In *Kremen*, all occupants of the cabin were arrested; but in this case only Porter, of all the occupants, was taken into custody. Thus, unlike the situation presented in *Kremen*, there was a possibility here that the evidence contained in the Porter dwelling would have been disposed of had it not been immediately seized by the officer upon the petitioner's arrest.

As was noted above, we regard the rule which this Court established in the *Von Cleef* case as a new evidentiary exclusionary rule because, in that case, this Court held for the first time that a seizure without a search warrant of an abundance of relevant evidence as an incident to a lawful arrest is unconstitutional; therefore, if *Von Cleef* is to be applied retrospectively, distinctions between its facts and those of this case should also be made. In *Von Cleef*, the petitioners, among other things, were charged with maintaining a building for purposes of lewdness and permitting a building to be used for purposes of lewdness. Apparently, the mere occupation of a building in which lewdness was permitted is not a crime under New Jersey law; however, in this case, the mere occupation of a building containing gambling paraphernalia is so under South Carolina law. In *Von Cleef*, as in *Kremen*, all occupants were taken into custody while in this case, as was mentioned, only Porter, who was not the sole occupant of the dwelling, was arrested; and, as we have said, there was a real chance that the gambling apparatus and related articles kept by Porter in his home would have been destroyed had it not then been seized by the police.

Assuming that *Von Cleef* is to be applied retrospectively and that validity of the search and seizure in this case depend upon whether the amount of relevant evidence taken by the officers was an unconstitutional amount, the issue is one that cannot easily be resolved because this Court has never indicated the amount of evidence which it

considers to be an unconstitutional abundance, if seized without a search warrant as an incident to a lawful arrest.

Too, the record in this case is silent as to the amount of time that the search required to complete, the size of the Porter home, as well as the precise number of items seized by the officers. There was no testimony at all concerning these factors offered at the hearing conducted by the District Court (App. at 2), and the trial testimony does not refer to them either. The record merely shows that the officers, upon arresting the petitioner in his living room pursuant to an arrest warrant, went immediately and directly to the basement (App. at 16); and it was from two basement rooms that they gathered a quantity of gambling paraphernalia (App. at 21 and 32), evidence which bore a reasonable relationship to the crime with which Porter was charged and of which he was later convicted.

Because in a *habeas corpus* proceeding the petitioner, in this instance Porter, has the burden of proving by the preponderance of the evidence the alleged violations of his constitutional rights, *Johnson v. Zerbst,* 304 U. S. 458 (1938); *Post v. Boles,* 332 F. (2d) 738 (4th Cir. 1964), this Court should not presume that his home was of such a size, the time spent by the officers in searching it was of such a length, and the articles taken were of such a quantity that the search and seizure in this case were invalid. Rather, this Court should confine itself to the record and base its findings upon the facts and circumstances therein disclosed. In doing so, the test of reasonableness should be employed.

Of course, if the rule established by the *Chimel* case is to be applied retroactively, the search without a warrant of Porter's entire home was invalid and the trial court should not have admitted into evidence, over objection, the gambling paraphernalia which the officers seized in making that search. The Circuit Court held that the *Chimel* holding was to be applied only prospectively, *i. e.,* only to searches

conducted after June 23, 1969, the date *Chimel* was decided. (App. of Petition at 35.) That holding is manifestly correct. Obviously, the exclusion of evidence seized prior to *Chimel* would not serve to deter similar searches and seizures in the future. It would, however, overturn convictions based upon fair reliance on pre-*Chimel* decisions; and it would make greater the burden on the administration of justice. Cf. *Desist v. United States,* 394 U. S. 244 (1969).

The Circuit Court's holding finds support from other jurisdictions in the following cases: *United States v. Bunch,* ... U. S. C. M. A. ..., 6 Cr. L. R. 2452 (1970); *United States v. Blassick,* ... F. (2d) ..., 6 Cr. L. R. 2411 (7th Cir. 1970); *Williams v. United States,* 418 F. (2d) 159 (9th Cir. 1969); *Lyon v. United States,* 416 F. (2d) 91 (5th Cir. 1969); *United States v. Bennett,* 415 F. (2d) 113 (2d Cir. 1969); *Thornton v. State,* ... Tex. ..., 6 Cr. L. R. 2389 (1970); *Derouen v. Sheriff,* ... Nev. ..., 6 Cr. L. R. 2246 (1969); *People v. Herrera,* ... Mich. App. ..., 172 N. W. (2d) 529 (1969); *People v. Edwards,* ... Col. ..., 453 P. (2d) 713 (1969); and *Scott v. State,* 7 Md. App. 505, 256 A. (2d) 384 (1969). See also, *Jordan v. United States,* 416 F. (2d) 338 (9th Cir. 1969), *cert. denied,* ... U. S. ..., 38 L. W. 3320 (1970).

Von Cleef, which, as we see it, also establishes a new evidentiary exclusionary rule, should not be applied retrospectively any more than *Chimel* should; and even if it is, there are, as we have pointed out, material factual differences between *Von Cleef* and the instant case which would preclude its application to the latter.

II.

The search for and seizure of gambling paraphernalia by law enforcement officers from the house of the petitioner without a search warrant should be sustained because the petitioner knowingly and intelligently consented to that search and seizure.

The Circuit Court did not reach the question concerning whether the petitioner consented to the search of his home (App. of Petition at 37), but the United States District Court did (App. of Petition at 25-31); and Porter argues that issue in his petition to this Court. (Petition at 8-16). The District Court held that the petitioner did not consent to the search of his home. (App. of Petition at 31).

As has been mentioned, immediately after Porter was placed under arrest at his home and while confronted by the arresting officers, he was told by one of them that they wanted "to look around." He replied "Go ahead", or "Help yourself." (App. at 15). The trial court and the Supreme Court of South Carolina concluded that the petitioner thereby freely and intelligently consented to the search and that the evidence seized as a result of that search was admissible. Reluctantly, the District Court disagreed and held that Porter did not voluntarily consent to the search of his dwelling and that the articles which that search produced were illegally obtained and should have been excluded from the evidence. In reaching its conclusion, the District Court stated that the burden was upon the State to establish a valid waiver by Porter of his Fourth Amendment protections. Apparently, it did not matter to the District Court that at no time, either at the trial of his case in the state court or at the hearing conducted in the District Court pursuant to the writ of *habeas corpus*, did Porter testify that, when the officers made

known their desire to search his house, he did not freely and understandingly consent to that search in telling the officers to proceed.

About two years ago, the Court to which the petitioner seeks *certiorari*, in *United States v. Vickers*, 387 F. (2d) 703 (4th Cir. 1967), observed:

> "[I]t is well settled that a 'search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search uncontaminated by any duress or coercion, actual or implied.' . . . Whether consent was voluntarily and intelligently given is a question of fact as to which the government has the burden of proof. . . ." 387 F. (2d) at 706.

But, it should be noted, the government, here the State, has the burden only during the original criminal proceeding. It does not have, as the District Court asserted (App. of Petition at 28-29), that burden in a *habeas corpus* action. The petitioner has offered no evidence whatever that his consent to the search was obtained by either duress or coercion. Manifestly, therefore, the petitioner failed to carry the burden which was his. An involuntary consent should not necessarily be presumed simply from the admitted fact that Porter was under arrest at the time that the consent was given. See, Annot., 9 A. L. R. (3d) 858 § 7[a] at 880 (1966).

Nonetheless, whether the consent of one in custody to a search is sufficient or not will depend upon the particular facts and circumstances of each case.

> "[T]here are no hard rules by which the presence of a certain fact (in addition to custody) will bind the court to a particular decision." 9 A. L. R. (3d) at 864.

The District Court did not believe that the petitioner freely consented to the search of his house because he,

moments before his arrest, asked the police if they had a search warrant. As far as the District Court is concerned, Porter allowed the search to take place only because he was under arrest and was in custody. In support of this position, the Court cited *Higgins v. United States*, 209 F. (2d) 819 (D. C. Cir. 1954) (App. of Petition at 28), for the proposition that "no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." 209 F. (2d) at 820. Not everyone would agree. *Viz.*:

> "Roche, who did not testify at the hearing on his motion to suppress, points to cases indicating that consent to a search is not to be lightly inferred . . . and argues that since it is incredible he would freely have consented to a search which he knew would disclose incriminating evidence, his words of consent should be considered an involuntary submission to authority and therefore insufficient to waive a constitutional right. Acceptance of this contention would mean that expressions of consent could relieve officers of the need of obtaining a warrant only when the speaker was not aware that the search would disclose damaging evidence—a fact usually not within the officers' knowledge. Such a ruling not only would almost destroy the principle permitting a search on consent but would enable experienced criminals to lay traps for officers who, relying on the words of consent, failed to secure a search warrant that would have been theirs for the asking. Where, as here, no force or deception was either used or threatened, we see no reason why a court should disregard a suspect's expression of consent simply because efficient and lawful investigation and his own attempt to avoid apprehension had produced a situation where he could hardly avoid giving it. . . ." *United States v. Gorman*, 355 F. (2d) 151 at 158 (2d Cir. 1965), *cert. denied*, 384 U. S. 1024 (1966).

The reference in *Gorman* to an absence of force and deception is, we think, of significance. The District Court cites *Judd v. United States*, 190 F. (2d) 649 (D. C. Cir. 1951), as a case which holds that where a defendant is in custody any consent to a search and seizure is necessarily the result of coercion. The factual situation in *Judd* is very much different from that here.

> "[T]he appellant was arrested late at night without a warrant, booked on an open charge for 'investigation', questioned for several hours by various police officers, then taken away, while handcuffed, and in custody of four officers." 190 F. (2d) at 651.

In this case, the petitioner was arrested at about 10:30 a. m. (App. at 13) upon an arrest warrant. He was not questioned at all, and he was not handcuffed. No force whatever was used.

The District Court also speaks of the coercion which is allegedly "implied in situations where consent is obtained under color of badge." (App. of Petition at 29).

On the other hand, it has been said:

> "[P]erhaps there is a coercive effect inherently produced where several police officers, with their uniforms and accompanying paraphernalia, confront a suspect and ask for permission to search. To sustain such a claim of coercion, absent any coercive words or acts by the police, would preclude a voluntary consent to search whenever more than one armed police officer confronts a suspect; it is only their number, their equipment and the fact they are police that appellant claims adds up to coercion. We refuse to so hold." *United States v. Thompson*, 356 F. (2d) 216 at 220 (2nd Cir. 1965).

Where a defendant is either in custody or under formal arrest and consents to a search and seizure, there simply are no established criteria by which to test the vol-

untariness of that consent. Most courts, though, have been hesitant either to require police officers to be clairvoyant or to have them engage in either psychological or physiological inquiries as to the meaningfulness of an invitation. *Robbins v. MacKenzie,* 364 F. (2d) 45 (1st Cir. 1966), *cert. denied,* 385 U. S. 913 (1966). They have also been slow to overturn the factual determinations of the trial and appellate courts when such are brought to them in *habeas corpus* proceedings. Cf. *Wade v. Warden,* 278 F. Supp. 904 (D. C. Md. 1968). The determination by the trial court and the Supmeme Court of South Carolina that Porter freely and intelligently consented to the search of his house should, we submit, be respected, especially since Porter never chose to rebut that finding by testifying concerning it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Porter's petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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